

**Application of the CISG by Courts and Arbitral Tribunals:**

**Comparative Analysis**

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## **Abstract**

In contemporary international commerce the uniformity and the legal certainty is of utmost importance. The Vienna Convention on International Sale of Goods 1980 (the CISG) constitutes a uniform framework for business people involved in the sale of goods. So far increasing number of the contracting states shows that the CISG has achieved certain amount of success. Despite the fact that the CISG is applied in majority of the contracting jurisdiction there still remain number of countries where the Convention has never been applied to the disputes by the dispute resolution bodies.

This thesis will concentrate on analyzing the general trends employed by the different dispute resolution bodies, namely courts and arbitral tribunals, in application of the CISG in order to determine whether the uniform application has been achieved. Moreover, it will evaluate whether criteria elaborated by the courts and the tribunals can be used by the judiciary in different jurisdictions.

The study will be based on the discussion of the scholarly opinions and the case law analysis.

## INTRODUCTION

The United Nations Convention on International Sale of Goods (hereinafter, the CISG, the Convention) signed in 1980 is a uniform international treaty. Increasing number of the Contracting States highlights the success of CISG in terms of establishing a uniform framework for merchants involved in an international sale of goods.<sup>1</sup> It has been widely applied to international commercial transactions in the past decades with more than 3000 decisions by state courts and arbitral tribunals having been presented.<sup>2</sup> ‘It therefore seems fair to say that the CISG has in fact been one of the success stories in the field of the international unification of private law.’<sup>3</sup> Such success of the Convention should be attributed to its international character<sup>4</sup> and requirement of uniform interpretation and application.<sup>5</sup> Moreover, the CISG encourages international trade by harmonizing trade usages, practices and otherwise conflicting rules.<sup>6</sup>

It is undisputed that high degree of unification will promote international commerce and exchange of goods as merchants will be provided with legal certainty of the outcome. Since the Convention is well-suited to international transactions, the more it applies, the more legal certainty that may be achieved. Usually, decisions based on the modern (and 'neutral') law of the Convention are more acceptable to both parties than one party's domestic law, often

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<sup>1</sup> 10 countries adopted CISG during last 7 years among them major producing and exporting countries like Japan (2008), Turkey (2010) and Brazil (2014).

<sup>2</sup> see Pace database on CISG

<sup>3</sup> Huber/Mullis, *The CISG* (Sellier European Law Publishers 2007) 1

<sup>4</sup> Article 7(1) CISG ‘In the interpretation of this Convention, regard is to be had to its international character’ [*emphasis added*]

<sup>5</sup> Article 7 (1) CISG ‘regard is to be had [...]to the need to promote uniformity in its application’ [*emphasis added*]; Huber/Mullis *the CISG* page 7

<sup>6</sup> Glower W. Jones *Warranties in International Sales: UN Convention on Contracts for the International Sale of Goods Compared to the US Uniform Commercial Code on Sales in 17 International Business Lawyer* (1989) 497

unfamiliar to the other party.<sup>7</sup> The Convention creates a framework in which business people involved in an international sale of goods can work without further need to familiarize themselves with the domestic law of their business partners as long as the CISG is applicable to their agreements.

In real life cases international commerce frequently involves parties from different states. When dispute occurs number of questions arise, namely, which forum has jurisdiction over the case, how can applicable substantive law be determined by the dispute resolution body etc. This thesis will focus on issue of evaluation of the approaches adopted by the courts in different jurisdictions and arbitral tribunals towards application of the CISG to the international commercial disputes. Discussion will be based on the scholarly writings and case law analysis. It will further compare standards elaborated by the courts and arbitral tribunals and evaluate whether, in this regard, there is any distinction between them.

Topic of applicability of the CISG has been subject to scholarly scrutiny and number of works has been dedicated to this issue. However, it still maintains the relevance as the number of the Contracting states of the Convention increases and more disputes are subjected to the CISG.<sup>8</sup> Recent case law from El Salvador, which has ratified the CISG in 2006, shows that issue of wrongful application of the Convention to the disputes is still actual.<sup>9</sup> Moreover, it has been acknowledged that ‘about seventy to eighty percent of all international sales transactions are potentially governed by the CISG.’<sup>10</sup> Nonetheless, case law on CISG is

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<sup>7</sup> Christophe Bernasconi *The Personal and Territorial Scope of the Vienna Convention on Contracts for the International Sale of Goods (Article 1)* in 46 Netherlands International Law Review(1999) 154

<sup>8</sup> See (n 1)

<sup>9</sup> El Salvador 28 February 2013 [Second Civil Court] (Properties case)  
< <http://cisgw3.law.pace.edu/cases/130228e5.html> > ‘accessed 12 February 2015’

<sup>10</sup> Schwenger/Hachem *The CISG - Successes and Pitfalls* American Journal of Comparative Law (Spring 2009) 457

available only from number of Contracting jurisdictions.<sup>11</sup> Among others, grounds for such result might be uncertainty with principles of application of the Convention to the disputes. For this reason, this thesis will concentrate on elaborating guidelines for application of the CISG based on existing case law.

Main focus will be on the Article 1 CISG, as autonomous<sup>12</sup>, internal<sup>13</sup> rules of application and limits of the Convention's scope. Nevertheless, provision containing its supplementary rules dealing with relevant concepts will also be discussed<sup>14</sup>.

First chapter will analyze how courts in the Contracting and Non-Contracting States apply CISG to the disputes when parties to the contract make an explicit or 'tacit'<sup>15</sup> choice of CISG as applicable substantive law or when they fail to do so. It will further evaluate the scholarly point of view of the topic and case law is development in this regard. Courts in Article 95 CISG Reservation Contracting states will be discussed separately.<sup>16</sup>

Second chapter will discuss how arbitral tribunals apply the CISG to the disputes when there is choice of law and when there is no choice of law in different case scenarios, what is scholarly position in this regard and how is case law developing. The discussion will be limited to the institutional arbitration.

As a conclusion the trends employed by these two dispute resolution bodies will be compared. It will be evaluated whether there are any differences between standards applied

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<sup>11</sup> See CISG Pace Database <<http://www.cisg.law.pace.edu/cisg/text/casecit.html>> 'accessed 16 February 2015' case law available from 51 out of 83 contracting states

<sup>12</sup> Kroll/Mistelis/Viscasillas UN Convention on Contracts for International Sale of Goods (CISG) (München : Verlag C. H. Beck ; Oxford : Hart, c2011) 27

<sup>13</sup> Lisa Spagnolo, CISG Exclusion and Legal Efficiency (Wolters Kluwer, 2014 ) 10

<sup>14</sup> Schlechtriem/Schwenzer, Commentary on UN Convention on the International Sale of Goods (CISG) (Oxford University Press 3<sup>rd</sup> edition 2010) 31

<sup>15</sup> Italy 12 July 2000 District Court Vigevano (*Rheinland Versicherungen v. Atlarex*) <available at <http://cisgw3.law.pace.edu/cases/000712i3.html>>

<sup>16</sup> Lisa Spagnolo, CISG Exclusion (n 13) acknowledges the need of distinction between the courts in non-reservation contracting states and the courts in 95 CISG Reservation contracting states.

by the courts and tribunals in determining the CISG as applicable substantive law to the dispute. Further it will analyze if there is any difference between courts of contracting and non-contracting states when it comes to application of the CISG to the disputes. Moreover, it will evaluate if there is *stare decisis* obligation<sup>17</sup> on the courts and tribunals in terms of determining CISG as applicable law to the disputes when facts of the case are comparable to ones already decided by the other dispute resolution bodies.

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<sup>17</sup> Franco Ferarri, 'CISG Case Law: A New Challenge for Interpreters?' in 17 Journal of Law and Commerce (1999) 258

## Chapter 1

This chapter will concentrate on evaluation of the trends adopted by the courts in different jurisdictions with regard to application of the CISG to the international commercial disputes. First it will address the scholarly and case law approach regarding the applicability of the Convention by the courts in the Contracting Non-Reservation states (hereinafter “Contracting States”). Further in the light of the doctrinal point of view and corresponding case law it will discuss the approach elaborated by the courts in Article 95 CISG Reservation Contracting states (hereinafter “Article 95 Reservation States”). Finally, the applicability of the Convention by the courts of the Non-Contracting States will be analyzed.

The applicability of the Convention in the above mentioned case scenarios will be analyzed in the light of the party autonomy regarding choice of applicable substantive law to the contract and in absence of such.

### 1. Courts in the Contracting States

Article 91 CISG defines the notion of the Contracting State of the Convention. Under this article state is the Contracting one if it has ‘ratified, accepted, approved or acceded the Convention.’<sup>18</sup> It has been argued that ‘[the] CISG is a *self executing* Convention and in the Contracting states applies automatically.’<sup>19</sup> Treaty’s binding power, under Public International Law, over the Contracting State itself causes the autonomous application of the Convention when requirements of its applicability are met.<sup>20</sup>

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<sup>18</sup> Kroll/Mistelis/Viscasillas UN Convention Sale of Goods (CISG) (n 12)1195; see “Status of CISG” < available at <http://www.cisg.law.pace.edu/cisg/countries/cntries.html>>

<sup>19</sup> Lisa Spagnolo, CISG Exclusion (n 13) 288

<sup>20</sup>Schlechtriem/Schwenzer, Commentary on CISG (n 14) 103; Christophe Bernasconi *The Personal and Territorial Scope of the Vienna Convention (Article 1)* (n 7) 154;

## 1.1 Application of the CISG when there is choice of law

One of the most important principles of the CISG is the Party Autonomy principle established by the Article 6 CISG.<sup>21</sup> Under this principle parties to the contract are free to subject their contract to the CISG. This is true even in the cases when the CISG ‘is not applicable by operation of Articles 1, 2 and 3 [CISG].’<sup>22</sup> Choice of the Convention as applicable substantive law to the dispute can be express<sup>23</sup> or ‘tacit’<sup>24</sup>.

It has been widely acknowledged by the courts and the scholars that parties' agreement to submit the contract to the law of a Contracting State qualifies as an implied choice of the Convention.<sup>25</sup> National judges have affirmed this principle even in cases where the forum court was that of a non-Contracting State.<sup>26</sup>

However, somewhat contradicting approach has been shown towards this principle in the decision of the *Cour d'Appel de Colmar*<sup>27</sup> later upheld by the *Cour de Cassation*<sup>28</sup>. In this case French seller and the Irish buyer choose French Law as law applicable to the contract. Despite the acknowledgement that the contract was of international character and concerned sale of goods *Cour d'Appel* rejected buyer's appeal to invoke the CISG as applicable law.

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<sup>21</sup> Janssen/Meyer CISG Methodology (Sellier European Law Publishers, 2009) 271

<sup>22</sup> Kroll/Mistelis/Viscasillas UN Convention (n 12) 99

<sup>23</sup> Parties to the Contract make an express statement that the Convention applies to the contract. E.g ‘This contract will be governed by the CISG’ or ‘This contract will be governed by the Vienna Convention 1980’

<sup>24</sup> Parties to the contract refer to the law of a Contracting State as law governing their contract. See Tribunale di Vigevano, Italy, 12 July 2000.

<sup>25</sup> Kroll/Mistelis/Viscasillas UN Convention (n 12) 101; Bonell/Liguori - *The U.N. Convention on the International Sale of Goods: A Critical Analysis of Current International Case Law - 1997 (Part 1)* Revue de droit uniforme/Uniform Law Review (1997) 385; Schlechtriem *Requirements of Application and Sphere of Applicability of the CISG* in *Victoria University of Wellington Law Review* (2005/4) 781-794

<sup>26</sup> Bonell/Liguori - *The U.N. Convention on the International Sale of Goods* (n 25) 387;

<sup>27</sup> France 26 September 1995 Appellate Court Colmar (*Ceramique Culinaire v. Musgrave*)  
< <http://cisgw3.law.pace.edu/cases/950926f1.html>>

<sup>28</sup> France 17 December 1996 Supreme Court (*Ceramique Culinaire v. Musgrave*)  
< <http://cisgw3.law.pace.edu/cases/961217f1.html>>

Court reasoned that by determining French law as applicable law to the contract parties intended to subject it to the *domestic* [emphasis added] French law. *Cour de Cassation* criticized such rejection of the application of the CISG, however, did not reverse the judgment in this regard. Instead it found analog to the relevant clause from the CISG in the Civil Code.<sup>29</sup>

It is also a well established principle that '[the] CISG has a dispositive character so that contracting parties may exclude its application.'<sup>30</sup> The Convention is based on '*opt[ing] out approach*.'<sup>31</sup> Under Article 6 CISG parties to the contract may choose to exclude applicability of the CISG by subjecting their agreement to another law.<sup>32</sup> Opting out of the Convention can be done by choice of law of a non-contracting state or implicitly by choice of domestic sales law of a contracting state.<sup>33</sup> If the parties do not wish the CISG to apply, when requirements for application of the Convention (Art. 1-5, 100) are met, opting out becomes the necessary element as otherwise CISG applies *ex officio* as law in force.<sup>34</sup>

Requirement of an express opt out of the Convention's application has been upheld by various court decisions. In *Oberlandesgericht Hamm*<sup>35</sup> it has been decided that the express reference to the *provisions of the German Civil Code* made by the parties in the course of the proceedings, while constituting a valid choice of law according to German conflict of laws rules, *was not sufficient to exclude the application CISG to the contract* [emphasis added].

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<sup>29</sup> France 17 December 1996 Supreme Court (Ceramique Culinaire v. Musgrave) <<http://cisgw3.law.pace.edu/cases/961217f1.html>>

<sup>30</sup> Kroll/Mistelis/Viscasillas UN Convention (n 12) 101

<sup>31</sup> Schlechtriem/Schwenzer Commentary on CISG (n14) 103

<sup>32</sup> Kroll/Mistelis/Viscasillas UN Convention (n 12) 99; Schlechtriem/Schwenzer Commentary on CISG (n 14) 103

<sup>33</sup> Schlechtriem/Schwenzer Commentary on CISG (n 14) 108; Kroll/Mistelis/Viscasillas UN Convention (n 12) 102-103; Bonell/Liguori - *The U.N. Convention* (n 25) 389; Peter Schlechtriem *Requirements of Application of the CISG* (n 25) 784

<sup>34</sup> Schlechtriem/Schwenzer Commentary on CISG (n 14) 103

<sup>35</sup> Germany 9 June 1995 Appellate Court Hamm (Window elements case) <available at <http://cisgw3.law.pace.edu/cases/950609g1.html>>

The court found that the CISG was applicable to the contract, holding that the express reference made by the parties during the court proceedings to the German civil law amounted to a valid choice of law but not to an exclusion of the CISG, since the CISG is an essential part of German law.<sup>36</sup>

*Tribunale di Padova*<sup>37</sup> has shown the approach similar to the *Oberlandesgericht Hamm* towards the case where parties failed to effectively exclude the application of the CISG. Namely, court reasoned that mere fact that in their pleadings the parties referred only to the domestic laws of the two countries involved *is not sufficient [emphasis added]* to establish a clear intention of the parties to exclude the application of the Convention and have instead one or the other domestic law applied.<sup>38</sup>

Somewhat controversial is the practice established in the US as it seems that the US courts only acknowledge the express exclusion of the CISG.<sup>39</sup> In this regard important cases from the US practice are: *Forestal Guarani, S.A. v. Daros International, Inc.* in which court reasoned that ‘the inclusion of an alternate choice of law provision must, however, be announced explicitly in the contract.’<sup>40</sup>; and *TeeVee Toons, Inc. v. Gerhard Schubert GmbH* stating that opt out of the application of the CISG should be done by express provision in the contract at issue.<sup>41</sup> In both cases the CISG has been applied by the courts as there was no express exclusion of its applicability.

*Tribunale di Vigevano*<sup>42</sup> in its decision reasoned that while the parties are free to exclude

<sup>36</sup> Germany 9 June 1995 Appellate Court Hamm (Window elements case) <available at <http://cisgw3.law.pace.edu/cases/950609g1.html>>

<sup>37</sup> Italy 25 February 2004 District Court Padova (Agricultural products case) <available at <http://cisgw3.law.pace.edu/cases/040225i3.html>>

<sup>38</sup> *ibid*

<sup>39</sup> Schlechtriem/Schwenzer Commentary on CISG (n14) 104;

<sup>40</sup> United States 7 October 2008 Federal District Court [New Jersey] (*Forestal Guarani, S.A. v. Daros International, Inc.*) Not Reported in F.Supp.2d, 2008 WL 4560701 (D.N.J.)

<sup>41</sup> TeeVee Toons, Inc. v. Gerhard Schubert GmbH Not Reported in F.Supp.2d, 2006 WL 2463537 S.D.N.Y., 2006 <available at <http://cisgw3.law.pace.edu/cases/020329u1.html>>

<sup>42</sup> Italy 12 July 2000 District Court Vigevano (n 15)

application of CISG either expressly or impliedly (Art. 6 CISG), the mere reference to domestic law in the parties' pleadings is not itself sufficient to exclude CISG. To this effect parties must first of all be aware that the CISG would be applicable and moreover intend to exclude it. Court also determined the notion of the burden of proof when it comes to party's declaration about inapplicability of the CISG. If a party asserts that the CISG is inapplicable because sales contract is not "international" or because the parties have contractually derogated from its applicability pursuant to Article 6 CISG, that proponent party to the contract must prove the inapplicability of the CISG.<sup>43</sup>

### **1.2 Application of the CISG when there is no choice of law**

In many cases parties to the contract fail to choose the substantive law applicable to their contract. In case of dispute courts have to determine what is the law applicable to the contract by considering different factors. According to some court decisions, courts of the Contracting States have to look into whether the CISG applies before resorting to the private international law rules (of the forum).<sup>44</sup> Prevalence over the conflicts of law approach is due to the principle "lex specialis derogat generalis" and to the fact that the CISG is more specific than any private international law rule.<sup>45</sup>

Article 1 CISG, a unilateral conflict of law rule contained in the Convention<sup>46</sup>, covers two entry points for the CISG. Under Article 1(1)(a) the Convention is applicable to the contracts when the parties to the contract have their respective places of business in different

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<sup>43</sup> Italy 12 July 2000 District Court Vigevano (n 15)

<sup>44</sup> Kroll/Mistelis/Viscasillas UN Convention (n 12) 22; Ferarri/Flechtner/Brand The Draft UNCITRAL Digest and Beyond: Cases, Analysis and Unresolved Issues in the U.N. Sales Convention (Sellier. European Law Publishers, 2004) 22; *see* Tribunale di Pavia, Italy, 29 December 1999, CLOUTcase No. 380; Tribunale di Vigevano, Italy, 12 July 2000 (n 15)

<sup>45</sup> Ferarri/Flechtner/Brand The Draft UNCITRAL (n 44) 22; *see* Tribunale di Pavia, Italy, 29 December 1999, CLOUTcase No. 380; Tribunale di Vigevano, Italy, 12 July 2000 (n 15)

<sup>46</sup> Kroll/Mistelis/Viscasillas UN Convention (n 12) 22

Contracting States,<sup>47</sup> while 1(1)(b) underlines that the CISG is applicable if the forum's private international law rules lead to application of the law of a Contracting State.<sup>48</sup> These two sub-paragraphs are alternatives with primacy given to sub-paragraph (a).<sup>49</sup>

### 1.2.1 1(1)(a) CISG

According to the criterion set forth in Article 1(1)(a), the CISG is “directly”<sup>50</sup> or “autonomously”<sup>51</sup> applicable, or, as stated by the German Supreme Court, “without the need to resort to the rules of private international law, when the parties have their places of business in different Contracting States.”<sup>52</sup>

This approach has been upheld by the number of courts in different jurisdictions.<sup>53</sup> Test for the applicability of the CISG contained in the Article 1(1)(a) has been explained in *Landgericht Ellwangen*<sup>54</sup> judgment. Here court reasoned that the CISG is applicable through 1(1)(a) as both parties are from the contracting states.

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<sup>47</sup> Article 1 CISG

<sup>48</sup> *ibid*

<sup>49</sup> Kroll/Mistelis/Viscasillas UN Convention (n 12) 23; Petrochilos, *Arbitration Conflict of law rules and the 1980 Convention* (1995) 191-218; Michael Bridge *Uniform and Harmonized Sales Law: Choice of Law Issues in Fawcett/Harris/Bridge “International Sale of Goods in the Conflict of Laws”*, Oxford University Press 2005) § 16.20

<sup>50</sup> Switzerland 11 July 2000 Federal Supreme Court (*Gutta-Werke AG v. Dörken-Gutta Pol. and Ewald Dörken AG*) Since the requirements of CISG Art. 1(1)(a) are met, the Convention finds direct application, without recourse to the Swiss rules of private international law;

<sup>51</sup> Tribunale di Vigevano, Italy, 12 July 2000 (n 15); Oberster Gerichtshof, Austria, 20 March 1997 ‘Due to the fact that Austria and the Russian Federation are signatories to the UN Convention on Contracts for the International Sale of Goods (CISG; BGBl 1988/96), it applies by virtue of autonomous link (Art. 1(1)(a) CISG).’

<sup>52</sup> Ferarri/Flechtner/Brand *The Draft UNCITRAL Digest* (n 44) 32

<sup>53</sup> See: Kroll/Mistelis/Viscasillas UN Convention (n 12) 35, FN 86

<sup>54</sup> Germany 21 August 1995 District Court (Spanish paprika case)  
< <http://cisgw3.law.pace.edu/cases/950821g2.html>>

Further, it has been accepted that in the Contracting States, the convention is not foreign law but rather local, specialized law.<sup>55</sup> Therefore, under well established *jura novit curia* principle acknowledged by the scholars, courts will be bound to apply CISG where applicable, even if parties do not invoke it.<sup>56</sup>

This approach has been upheld by the *Egyptian Court of Cassation*<sup>57</sup> in its decision in which court invoked the CISG even though parties failed to do so. Italian seller and Egyptian buyer entered into a contract for the sale of marble. The First Instance Court applied the Egyptian law to the dispute without paying any attention to the CISG. The Appellate Court affirmed the decision. *Court of Cassation* found that the Court of Appeals erred in applying the domestic law to the dispute. Therefore, it ruled that the CISG should govern the dispute and remanded the case so that the Appellate court issues another decision to that effect. The Court reasoned that the CISG is applicable to the dispute by virtue of Article 1(1)(a).

"Surprisingly, none of the disputing parties requested the application of the CISG to the dispute. The Court of Cassation took the initiative to apply the Convention. This illustrates that neither the parties nor lower courts have adequate knowledge of the Convention. To a great extent, this decision rang a bell that alerts lower courts that they should apply the CISG whenever applicable."<sup>58</sup>

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<sup>55</sup> Michael Bridge Uniform and Harmonized Sales Law (n 49) §16.23

<sup>56</sup> Michael Bridge Uniform and Harmonized Sales Law (n 49) §16.23; Lisa Spagnolo, 'Iura novit Curia and the CISG: Resolution of the Faux Procedural Black Hole' in I. Schwenzer & L. Spagnolo (eds), *Towards Uniformity: the 2nd Annual MAA Schlechtriem CISG Conference* (Eleven International Publishing, 2011)

<sup>57</sup> Egypt 11 April 2006 Court of Cassation [Supreme Court] (*Marble case*)  
< <http://cisgw3.law.pace.edu/cases/060411e1.html>>

<sup>58</sup> Excerpt from Hossam A. El-Saghir, "The Interpretation of the CISG in the Arab World" (2008)  
< <http://cisgw3.law.pace.edu/cases/060411e1.html>>

### 1.2.2 1(1)(b) CISG

The conditions of an autonomous applicability of the Convention are not fulfilled when the parties to the contract have their places of business in different States but one or both of the States have not ratified the Convention.<sup>59</sup> Therefore recourse has to be made to the Article 1(1)(b) CISG.

The applicability of the CISG is not necessarily excluded where the parties do not have their places of business in different Contracting States. By operation of Article 1(1)(b) CISG the CISG can be applicable even where *one or both parties* do not have their places of business in Contracting States, provided that the rules of private international law lead to the application of the law of a Contracting State.<sup>60</sup> Moreover, wording of the Article 1(1)(b) also makes explicit that the Convention will be part of national domestic law in all contracting states<sup>61</sup>

In relatively recent decision by the *Oberlandesgericht Hamburg*<sup>62</sup> court established applicable law to the Contract between the German seller and Turkish buyer<sup>63</sup> by referring to applicable international private law rules (Rome I regulation). In this case, applicable law was German law. Court further reasoned that the referral to German law leads to the applicability of the United Nations Convention on Contracts for the International Sale of Goods (CISG), even though Turkey is not contracting partner to the convention. It is

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<sup>59</sup> Christophe Bernasconi *The Scope of the Vienna Convention* (n 7) 155

<sup>60</sup> Ferarri/Flechtner/Brand *The Draft Digest* (n 44) 40; see Australia 17 November 2000 Supreme Court of Queensland (*Downs Investments v. Perwaja Steel*); Argentina 24 April 2000 Appellate Court (*Mayer Alejandro v. Onda Hofferle*)

<sup>61</sup> Kroll/Mistelis/Viscasillas UN Convention (n 12) 23; Article 1(1)(b) CISG : '[...] when the rules of private international law lead to the *application of the law of a Contracting State.*' [*emphasis added*]

<sup>62</sup> Germany 15 July 2010 Appellate Court Hamburg (*Medical equipment case*) <available at <http://cisgw3.law.pace.edu/cases/100715g1.html>>

<sup>63</sup> By this moment Turkey was not Contracting State of the CISG yet.

sufficient that Germany. This leads to the application of the Convention through Art. 1 (1)(b) CISG.

Issue which might be of importance here is the situation when Article 1(1)(b) leads to the law of a Reservation State<sup>64</sup> as applicable. It has been argued that in such case forum state has to apply this state's law in the way the courts in that state would do. This would lead to the application of this state's domestic law, but not to the application of the CISG.<sup>65</sup> There is also a contradicting opinion shown among scholars that Article 95 CISG Reservation does not say that the Reservation State is not to be regarded as a Contracting State for the purposes of the Article 1(1)(b) CISG.<sup>66</sup> In this regard an interesting point of view has been shown by the Federal Republic of Germany during ratification of the Convention. Even though Germany has not made a reservation under Article 95 it gave an explanatory note regarding interpretation of the Article 1(1)(b) CISG. This explanation provides that if the conflicts rules of Germany point to the law of a country which has filed an Article 95 reservation, the applicable law is that country's domestic law and not the CISG.<sup>67</sup>

An interesting approach has been adopted by the *Oberlandesgericht Koblenz*<sup>68</sup> regarding the test which court may apply in determination of the applicable law through Article 1(1)(b) CISG. The court held that the rules of private international law of Germany led to the application of French law. Since the CISG was in force in France as of 1 January 1988, even though Germany was not a Contracting State at that time, the CISG was held to be applicable. Court also *took in consideration* the following point: The text of the choice of law clause and

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<sup>64</sup> Article 95 CISG reservation, which states that Contracting states making Article 95 declaration are not bound by Article 1(1)(b) CISG, discussed bellow.

<sup>65</sup> Huber/Mullis the CISG (n 3) 55

<sup>66</sup> Ibid 55

<sup>67</sup> Christophe Bernasconi *The Scope of Convention* (n 7) 168

<sup>68</sup> Germany 17 September 1993 Appellate Court Koblenz (*Computer chip case*)  
<available at <http://cisgw3.law.pace.edu/cases/930917g1.html>>

the circumstances, namely the *formulation of the contract in French language* and the fact that the seller granting the exclusive distribution right is a French company, clearly lead to the conclusion that the parties submitted their contractual relations to French law. Court further reasoned that since domestic law of a Contracting State is substituted by the Convention and France has not made Article 95 CISG Reservation (the Convention must be applied).<sup>69</sup>

## 2. Courts in the Contracting 95 Reservation States

Under Article 95 Reservation the Contracting State making such declaration is not bound by the Article 1(1)(b) CISG. So far several Contracting states have made such declaration.<sup>70</sup> A reservation under Article 95 considerably reduces the reach of the CISG and constitutes a brake-block to the effective spreading of a modern, well-suited tool.<sup>71</sup> By providing that a declaring State 'will not be bound' by Article 1(1)(b) CISG, Article 95 CISG makes clear that this reservation merely removes the declaring State's *obligation* under public international law to apply the Convention in accordance with Article 1(1)(b) CISG.<sup>72</sup> However, from practical point of view, application of a well established international tool seems more appropriate than application of the domestic law of a Contracting State which has closest connection to the transaction.<sup>73</sup>

### 2.1 Application of the CISG when there is choice of law

Issue of designation of the applicable law when there is tacit choice of applicable law is very important when the forum is located in the Article 95 Reservation Contracting State. In its decision *St. Paul Guardian Insurance Company et al. v. Neuromed Medical Systems &*

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<sup>69</sup> Germany 17 September 1993 Appellate Court Koblenz (*Computer chip case*)

< <http://cisgw3.law.pace.edu/cases/930917g1.html> >

<sup>70</sup> Article 95 Reservation Contracting States: China, United States, Singapore, St. Vincent & Grenadines;

<sup>71</sup> Christophe Bernasconi *The Scope of the Convention* (n 7) 165

<sup>72</sup> CISG Advisory Council, CISG-AC Opinion 15, § 3.7

<sup>73</sup> Christophe Bernasconi *The Scope of the Convention* (n 7) 165

*Support et al* the US Federal District Court of New York<sup>74</sup> court reasoned that Article 95 Reservation did not restrict court from applying the CISG through Article 1(1)(a) CISG. In this case, parties to the contract designated German law as the applicable law. The court applied CISG as the relevant German Law since test contained in the Article 1(1)(a) was met. The Parties had their places of business in two different Contracting States and had not agreed to exclude the CISG. The Court noted that on similar facts German Courts apply the Convention as applicable German Law.<sup>75</sup>

## **2.2 Application of the CISG when there is no choice of law**

Cases listed in the draft Digest that deal with the reservation at hand merely (but correctly) point out that the reservation does not impact the CISG's applicability by virtue of article 1(1)(a).<sup>76</sup>

This scholarly approach has been upheld by the decision from the US Federal Appellate Court of 4th Circuit.<sup>77</sup> In this decision court reasoned that the Convention governed the contract on the basis of Article 1(1)(a) CISG. It also stated that gaps in the Convention were to be filled by Maryland law if the Convention or the general principles on which it was based did not provide a solution (art. 7(2) CISG).<sup>78</sup>

It has been argued, that where the forum is located in the Article State and the rules of private international law of that state lead to the applicability of the law of a Contracting State (whether reservatory or not), the CISG will not apply.<sup>79</sup> This view is held not only by commentators but also by a United States court U. S. District Court for the Southern District

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<sup>74</sup> United States 26 March 2002 Federal District Court [New York] (*St. Paul Guardian Insurance Company et al. v. Neuromed Medical Systems & Support et al*) <available at <http://cisgw3.law.pace.edu/cases/020326u1.html>>

<sup>75</sup> Ibid

<sup>76</sup> Ferarri/Flechtner/Brand The Draft Digest (n 44) 48; CISG Advisory Council, CISG-AC (n 72) §3.10

<sup>77</sup> United States 21 June 2002 Federal Appellate Court [4th Circuit] (*Schmitz-Werke v. Rockland*) <available at <http://cisgw3.law.pace.edu/cases/020621u1.html>>

<sup>78</sup> ibid

<sup>79</sup> Ferarri/Flechtner/Brand The Draft Digest (n 44) 49-50

of Florida<sup>80</sup> which stated that ‘the only circumstance in which the CISG could apply [in the court of a reservatory State] is if all the parties to the contract were from Contracting States.’<sup>81</sup> It can be argued from the mentioned scholarly and case law analysis that courts in a reservation state have an obligation to apply *the domestic law* [*emphasis added*] (and not the CISG as part of the foreign law) if its private international law rules designate the law of a Contracting State.<sup>82</sup>

### 3. Courts in the Non-Contracting States

Contracting States are treaty-bound to see to it that their courts apply the CISG. However, this issue becomes problematic when the forum is located in the Non-Contracting State as such obligation is clearly absent here.<sup>83</sup>

The courts of non-contracting states are indifferent to the tests contained in the Article 1 CISG.<sup>84</sup> Nonetheless, application of the Convention may result out of operation of the forum’s choice of law rules. The non-contracting states choice of law rules will often lead to application of either seller’s or buyer’s law.<sup>85</sup> If seller’s law is of contracting state’s then application of the Convention should be conducted pursuant to the article 1(1)(a) of the CISG, by applying the relevant “Dual Business Rule” test.<sup>86</sup> Nevertheless, it should be noted that some scholars consider that even in the cases when the relevant private international rules of the Non-Contracting State direct courts to the law of the CISG Contracting State,

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<sup>80</sup> U. S. District Court for the Southern District of Florida, United States, 22 November 2002 <available at <http://cisgw3.law.pace.edu/cases/021122u1.html>>

<sup>81</sup> Ferarri/Flechtner/Brand The Draft Digest (n 44) 49-50

<sup>82</sup> Huber/Mullis The CISG (n 3) 56; CISG-AC (n 72) §3.16; For contradicting opinion *see* application of the CISG as part of the foreign law) *see* however Schlechtriem, in: Schlechtriem/Schwenzer, Commentary, Art. 1 para. 41(2005)<sup>2nd</sup> ed

<sup>83</sup> Michael Bridge Uniform and Harmonized Sales Law (n 49) §16.23

<sup>84</sup> *ibid*

<sup>85</sup> For example states which are bound by the Rome I Regulation have to apply “characteristic performance test” which leads to application of the seller’s law.

<sup>86</sup> Michael Bridge Uniform and Harmonized Sales Law (n 49) §16.23

courts have no obligation to apply the Convention as such would equal to application of the foreign law.<sup>87</sup> It is a generally accepted fact that courts have to apply foreign law the way foreign country court would have applied it. For this purpose, ‘Courts can normally require parties to assist in establishing foreign law.’<sup>88</sup>

Furthermore, it may be argued that it is often easier for the courts of a non-Contracting State to apply the Convention than to try to determine, understand and apply the rules of a foreign domestic law; as there is a wealth of largely accessible information on the CISG, the judge sitting in a non-Contracting State has an easier access to useful information on the CISG than on almost any foreign substantive law.<sup>89</sup>

That is why in a non-Contracting State, the CISG cannot be applied on its own terms. However, if the private international law of the forum points to the law of a Contracting State, it is suitable to apply the CISG.<sup>90</sup> Although, it must be emphasized, though, that in such instances, public international law does not impose any obligation on the judge of the forum to apply the Convention.<sup>91</sup>

### **3.1 Application of the CISG when there is choice of law**

Under party autonomy principle, regarding choice of applicable substantive law to the contract, it can be asserted that court in the Non-Contracting state has to comply with the choice of law if such exists and apply it to the dispute.

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<sup>87</sup> Lisa Spagnolo, CISG Exclusion (n 13) 292

<sup>88</sup> Ibid 293

<sup>89</sup> Christophe Bernasconi *The Scope the Convention* (n 7) 161; Kroll/Mistelis/Viscasillas UN Convention (n 12) 38

<sup>90</sup> Christophe Bernasconi *The Scope of the Convention* (n 7) 161

<sup>91</sup> Ibid 168-169

### 3.2 Application of the CISG when there is no choice of law

If the forum is in a Non-Contracting State, the court will not apply the Convention through Art. 1 CISG. It will instead apply its own rules of private international law.<sup>92</sup>

It has been decided in *Nippon Systemware Kabushikigaisha v. O*<sup>93</sup> that CISG does not apply to the dispute even though the US party failed such motion. It is discussed in Obiter Dicta of the decision why CISG was not applied. Based on its evaluation, relying in part where the offer was made and where delivery took place (both in California), and in light of the "international" nature of the transaction (seller was from the US and the buyer from Japan), the court opined that Japanese conflict of law principles identified U.S. "federal" contract law as the law of the contract. That law, in turn, was identified as the CISG. Court further discussed relevant points to be taken into an account in a situation like this, where (1) the forum is a non-Contracting State, (2) the applicable law, as determined by the forum, is that of a Contracting State which has made an Article 95 declaration, and (3) the parties reside in (i) a Contracting State which has made an Article 95 declaration (U.S.) and (ii) a non-Contracting State (Japan), the consensus view is that the CISG should NOT be applied;<sup>94</sup>

Relatively different result has been shown by the District Court Brussels.<sup>95</sup> Dispute concerned Italian seller and the Belgian buyer. Court reasoned that CISG applied to the dispute but not on its own terms. Court ruled that since both parties are contracting states of the Hague Convention 1955 applicable law should be determined in accordance with this convention; Convention suggests that the seller's law is applicable, thus Italian law. CISG has been ratified by the Italy therefore, court found that CISG is applicable to the dispute; this

<sup>92</sup> Huber/Mullis *The CISG* (2007) p 55

<sup>93</sup> Japan 19 March 1998 Tokyo District Court (*Nippon Systemware Kabushikigaisha v. O.*) < available at <http://cisgw3.law.pace.edu/cases/980319j1.html>> Japan was not contracting state of the CISG at this moment

<sup>94</sup> *ibid*

<sup>95</sup> Belgium 13 November 1992 District Court Brussels (*Maglificio Dalmine v. Coviers*). <available at <http://cisgw3.law.pace.edu/cases/921113b1.html>> Belgium was not a Contracting state of the CISG by that moment

decision highlights once again that when forum is located in the non-contracting state CISG cannot and should not be applied on its own terms, rather such conclusion can be reached through operation of the Private International Law of the forum.<sup>96</sup>

In relatively recent decision the UK The High Court of Justice, Queen's Bench Division [Commercial Court]<sup>97</sup> decided that CISG applied to the dispute through operation of the Private international law rules. Respective parties to the contract in dispute were from Denmark (seller) and United Kingdom (buyer). Forum's conflict rules directed court to the law applicable in the seller's country, thus Danish law. Since Denmark is the CISG Contracting state court reasoned that law applicable to the contract would be CISG.<sup>98</sup>

It can be concluded from the cases discussed above that CISG can be applied by courts in the Non-Contracting through operation of the forum's private international law rules.

## Chapter 2

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<sup>96</sup> Ibid

<sup>97</sup> United Kingdom 1 May 2012 The High Court of Justice, Queen's Bench Division [Commercial Court] (Kingspan Environmental Limited, Tyrrell Tanks Ltd, Rom Plastics Limited, and Titan Environmental Ltd v. Borealis A/S and Borealis UK Ltd) < <http://cisgw3.law.pace.edu/cases/120501uk.html>>

<sup>98</sup> Ibid

This chapter will analyze trends employed by the arbitral tribunals regarding the application of the CISG to the international commercial disputes. First it will address the scholarly and case law approach regarding the applicability of the Convention by tribunals in the light of party autonomy regarding choice of substantive law. Further in the light of the scholarly writing and corresponding case law it will discuss the approach elaborated when there is no choice of such law. Moreover, it will evaluate whether tribunals have an obligation to apply CISG to disputes.

It has been acknowledged in the scholarly writings that application of the CISG by the arbitral tribunals constitutes a special case and needs to be analyzed in accordance with the criteria different from the ones applied to the courts.<sup>99</sup> At this point it should be analyzed whether tribunals have an obligation to apply the CISG at all.

According to the Article 26 of the Vienna Convention on the Law of Treaties expressly stipulates that ‘every treaty in force is binding upon the parties to it and must be performed by them in good faith.’<sup>100</sup> Therefore, the CISG is binding only upon its contracting states.<sup>101</sup> The rule of *pacta sunt servanda* contained in the Article 26 of this convention is also binding upon all of the branches of the government, namely, executive, legislative and judicial.<sup>102</sup> Arbitral tribunals ‘cannot by any stretch of imagination be equated to organs of any state’<sup>103</sup>, thus there is no direct public international law obligation to apply the

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<sup>99</sup> Kroll/Mistelis/Viscasillas UN Convention (n 12) 25; Schlechtriem/Schwenzer Commentary on CISG (n 14) 22

<sup>100</sup> Vienna Convention on the Law of Treaties <available at <https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf>>

<sup>101</sup> Corten/Klein The Vienna Conventions on the law of treaties A commentary Volume 1 Oxford University Press 2011 p 670

<sup>102</sup> Ibid

<sup>103</sup> Georgios C. Petrochilos Arbitration Conflict of law Rules (n 49)

Convention. In this regard it can be concluded that tribunals somewhat resemble the courts of the non-contracting states.<sup>104</sup>

### **1. Application of CISG when there is choice of law**

Party autonomy is the cornerstone of the CISG.<sup>105</sup> This principle as already discussed in the previous chapter stating that parties to the contract are free to choose the Convention as applicable law to their agreement or on the contrary exclude its application is stipulated in the Article 6 of the CISG.<sup>106</sup>

It has been widely accepted in doctrine and arbitral practice that party autonomy with regards to the choice of substantive law should be honored by the tribunals.<sup>107</sup> For example, the Article 21(1) of the ICC rules directly states that ‘The parties shall be *free to agree upon* the rules of law to be applied by the arbitral tribunal to the merits of the dispute.’<sup>108</sup> Therefore it is logical to conclude that whenever parties have chosen CISG as an applicable law to the merits of the dispute, tribunal should apply it. However, the issue here is the way parties to the contract have drafted the applicable law clause. As it has been seen in above discussion regarding the application of CISG by courts, choice of law by the parties can be performed in different ways. First, parties might explicitly state that “the CISG” or “Vienna Sales Convention 1980” applies to the case. Second, parties might agree that law of the Contracting state applies to the case, which according to some authors constitutes a tacit choice of the

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<sup>104</sup> Schlectriem/Schwenzer Commentary on CISG (n 14) 22; Georgios C. Petrochilos Arbitration Conflict of law Rules (n 49); Urs Peter Gruber “The Convention on the International Sale of Goods (CISG) In Arbitration” International Business Law Journal, No. 1 (2009) 23

<sup>105</sup> Marc Blessing, Choice of substantive law in international arbitration, Journal of International Arbitration, Kluwer Law International 1997, Volume 14 Issue 2) 39; Jeffrey Waincymer in Sharing International Commercial Law across National Boundaries ‘The CISG and International Commercial Arbitration: Promoting a Complimentary Relationship Between Substance and Procedure’ Wildy, Simmonds & Hill Publishing (2008) 584

<sup>106</sup> CISG Article 6

<sup>107</sup> This approach is supported by various arbitration rules and laws, such as ICC rules 21(1), LCIA rules 22(3); MKAC § 26(1) UNCITRAL Model Law 28(1)

<sup>108</sup> See ICC rules of Arbitration in force as from 1 January 2012 <available at <http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/>>

CISG.<sup>109</sup> Third, parties might exclude application of the CISG at all. Consequently, there are various case scenarios where the tribunal has power to decide whether to apply the Convention to the dispute or not.

Regarding the first case scenario where parties actively choose the Convention to be applicable substantive law tribunals as a rule honor such choice and apply the CISG to the disputes. This can be seen by number of cases from arbitral practice. One of the important cases in this regard is an *ICC No 11849 of 2003* award also referred as *Fashion Products Case*<sup>110</sup>. This case is the best illustration of the tendency that arbitral tribunals in order honor parties' direct choice of the CISG as an applicable law of the dispute go beyond the scope of the Convention. In this case issue before the tribunal was the termination of the long term distribution agreement. Choice of law by the parties' stipulated that:

'The Arbitrator shall apply the 1980 UN Convention on the International Sale of Goods for what is not expressly or implicitly provided for under the contract. Letters of Credit shall be governed by the Uniform Customs and Practices for Documentary Credits (1993 Revision), International Chamber of Commerce Publication no. 500.'

The framework distribution agreement which regulates the long-term relationship between the parties in prevailing opinion usually is not governed by the CISG.<sup>111</sup> However, sole arbitrator in this case interpreted parties' intentions in a way that by choosing the CISG and the UCP 500 as applicable law to the contract parties showed clear determination to exclude

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<sup>109</sup> Schlectriem/Schwenzer Commentary on CISG (n 14) 23

<sup>110</sup> ICC Arbitration Case No. 11849 of 2003 (Fashion products case) <available at <http://cisgw3.law.pace.edu/cases/031849i1.html>>

<sup>111</sup> Dr. Jelena Perovi Selected Critical Issues Regarding the Sphere of Application of the CISG *Belgrade Law Review*, Year LIX (2011) no. 3 pp 187-188

recourse to any national law rules. Moreover, sole arbitrator also highlighted that the wording of the choice of law clause suggests that parties did not intend to limit the application of the CISG to possible disputes related to single sales of products, but did rather submit the whole Agreement to its rules. Another important question if front of tribunal was whether the Convention contained the relevant rules to be applicable to the long term distribution agreement. This question has been answered by the arbitrator in positive stating that such rules could be found in the Convention.<sup>112</sup>

As mentioned above the choice of the CISG as applicable law can be tacit, indirect as well. It has been demonstrated in the *ICC No 6653 of 1993* also refereed as *Steel Bars Case* that choice of law of the Contracting state can be construed as choice of the CISG.<sup>113</sup> In this case parties have chosen French law to be applicable to the contract. Moreover, the tribunal noted that the contract concerned international trade interests because its performance assumed a movement of goods and payments across frontiers. Goods concerned also fell within the scope of application of the CISG. The tribunal also noted that the buyer was located in Syria, which was a party to the Convention at the time the contract was concluded and that the seller was located in Germany which became a party to the Convention after the time of the conclusion of the contract.<sup>114</sup>

Application of the Convention can be excluded by the express statement. It has been suggested that opt out of the applicability of the Convention has to be drafted in clear language evidencing such intent.<sup>115</sup> Express exclusion of the applicability of the CISG has been envisioned in the number of arbitral awards. This position has been upheld in the *ICC*

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<sup>112</sup> ICC No 11849 (n 110)

<sup>113</sup> ICC Arbitration Case No. 6653 of 26 March 1993 (Steel bars case) <available at <http://cisgw3.law.pace.edu/cases/936653i1.html> >

<sup>114</sup> ibid

<sup>115</sup> Thomas J. Drago, Esq. and Alan F. Zoccolillo, Esq Be Explicit: Drafting Choice of Law Clauses in International Sale of Goods Contracts The Metropolitan Corporate Counsel (May 2002) 9

*No 7565 of 1994*<sup>116</sup> also referred as the *Coke Case*. Parties, Dutch seller and the US buyer, in this case subjected their contract to “the laws of Switzerland”. At the time the contract was concluded the CISG, which was not then in effect in the Netherlands, was in effect in Switzerland as well as the United States. Dutch seller objected application of the CISG to the dispute and stated that referral to the “laws of Switzerland” meant express designation of the “neutral” national law as applicable law to the contract. This opinion however was not shared by the tribunal which indicated that CISG was part of the Swiss law. Further, neutrality requirement was also met as the Convention’s aims are consistent with it. Moreover, parties to the contract themselves referred to the “laws of Switzerland” and not to the “Swiss law” which covers only those statutes that have been enacted by Switzerland. That is why tribunal decided that the clause drafted by the parties did not opt out the applicability of the Convention. Ultimately, the tribunal applied the CISG to the dispute.

The *ICC No. 8482 of 1996*<sup>117</sup> also referred as *Engines Case* is in line with the tribunal’s reasoning in *ICC No 7565 of 1994* in a sense that tribunal refused to apply the CISG to the dispute as “Swiss Law” was chosen by the parties. Tribunal in this case reasoned that by choosing Swiss Law parties intended it to apply as a 'neutral' law. Moreover, choice of Zurich as the place of the arbitration may be construed as that the parties’ intention to apply the Swiss Code of Obligation and not the CISG. Further, tribunal submitted that it is of relatively less importance to determine whether application of the Swiss Code of Obligations was correct since the result of the award would have been the same under both statutes.

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<sup>116</sup> ICC Arbitration Case No. 7565 of 1994 (Coke case) <available at <http://cisgw3.law.pace.edu/cases/947565i1.html>>

<sup>117</sup> ICC Arbitration Case No. 8482 of December 1996 (Engines case) <available at <http://cisgw3.law.pace.edu/cases/968482i1.html>>

In addition one of the recent cases will be discussed for the purposes of demonstrating the express exclusion of the CISG. In the *ICC No 16168 of 2013* award it has been clearly demonstrated that the express exclusion of the CISG, namely, ‘Contract shall be governed in accordance with the laws of Germany. United Nations Convention on International Sale of Goods (CISG) shall not apply.’ constitutes a clear opt out from the Convention.<sup>118</sup> Moreover, in author’s opinion even if parties did not opt out from the applicability of the Convention it was unlikely that the CISG would have been rendered to be applicable since both parties were from Turkey.<sup>119</sup> It has been determined in the Secretariat Commentary on Article 1 of the CISG that ‘Convention is not concerned with the law governing contracts of sale or their formation where the parties have their places of business within one and the same State.’<sup>120</sup>

In its award of *10 December 1997* the *Arbitral Tribunal-Vienna*<sup>121</sup> highlighted several criteria which tribunal should consider before applying the CISG when parties have chosen law of the Contracting state to govern their contract. The contract in dispute consisted of general terms and condition of the seller which stated that Austrian law should apply. Tribunal acknowledged in the reasoning that the CISG can be applied as part of the Austrian law, but before such application would be rendered it examined such application against several points. First, it analyzed whether such application contradicted with the ‘individual conditions’ i.e the terms negotiated by the parties. Second, it evaluated whether application of the CISG contradicted with the general terms and conditions defined by the seller’s standard clauses. Moreover, tribunal explicitly discussed whether application of the CISG would contradict with the usages established by the parties via contracts concluded with each other.

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<sup>118</sup> ICC Arbitration Case No. 16168 of 18 December 2013 <available at <http://www.kluwerarbitration.com/CommonUI/document.aspx?id=KLI-KA-1345015n&query=content%3A%22cisg%22>>

<sup>119</sup> Ibid

<sup>120</sup> Commentary on the Draft Convention on Contracts for the International Sale of Goods prepared by the Secretariat Article 1 <available at <http://www.globalsaleslaw.org/index.cfm?pageID=644#Article 1>>

<sup>121</sup> Austria 10 December 1997 Vienna Arbitration proceedings S 2/97 (Barley Case) <available at <http://cisgw3.law.pace.edu/cases/971210a3.html>>

The last criterion examined by the tribunal seems of the high relevance as in international commerce trade usages have binding power over the parties adopting them. Even under the CISG trade usages have binding effect.<sup>122</sup>

To conclude, arbitral tribunals are bound by the choice of law made by the parties. This obligation is derived either out of the institutional arbitration rules<sup>123</sup> or the arbitration law applicable. Furthermore, party autonomy is the general principle under the CISG which in conjunction with the applicable arbitration leads to binding nature of the parties' choice of law, namely applicability of the CISG if such is not excluded expressly.

## **2. Application of the CISG when there is no choice of law**

Parties to the contract do not always stipulate the applicable substantive law. Therefore, whenever the dispute is submitted to arbitration tribunal itself has to determine which law applies to the merits of the case. There are several issues which need to be taken into consideration in terms of defining how arbitral tribunals determine the applicable substantive law. First, it needs to be analyzed whether tribunal is bound to refer to any conflict rules in order to determine applicable substantive law. In case of the positive answer it also needs to be defined which conflict rules should be utilized.

As a general rule arbitral tribunals should first of all look at the corresponding provision contained in the arbitration rules of that particular institution. In case of the ICC arbitration the relevant rule can be found in the ICC Arbitration Rules 2012. Article 21(1) of the rules states that 'in the absence of any such agreement [*on choice of law*], the arbitral tribunal shall

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<sup>122</sup> See Article 9 (1) of the CISG

<sup>123</sup> Modern institutional rules generally stipulate that tribunals are bound by the parties' choice of law.

apply the rules of law which it determines to be appropriate<sup>124</sup> The CIETAC Arbitration Rules also provide in Article 49(2) that ‘In the absence of such an agreement [*choice of law*], the arbitral tribunal shall determine the law applicable to the merits of the dispute.’<sup>125</sup> Third example that can also be discussed for the purposes of comparison is the MKAC<sup>126</sup> Arbitration Rules. Section 26(1) of the MKAC Arbitration Rules stipulates that in case of absence of the choice of law by the parties MKAC is authorized to determine the applicable law in accordance with the conflict rules it considers appropriate.<sup>127</sup> Analyze of these rules clearly shows a general trend employed by the tribunals in terms of determining the applicable substantive law when parties fail to do so.

In the context of application of the CISG the following issue is of relative importance. Is there a need for the arbitral tribunals to evaluate the applicability of the CISG in the light of the Article 1 of the Convention? As discussed above the CISG is not binding on the arbitral tribunals as they are not the contracting parties of the Convention in the sense of Vienna Convention on the Law of Treaties. Therefore, tribunals are not obliged to have a recourse to Articles 1(1)(a) and 1(1)(b) of the Convention and may determine the CISG as applicable law by the direct choice of such. It has been argued that it is easier for an arbitrator with discretion to choose the applicable law to ‘get to the CISG via a direct approach than via a conflicts approach.’<sup>128</sup>

The wording of the institutional rules, concerning determination of the applicable law, mentioned above is quite broad. They give tribunals discretion to apply conflict rules which they deem applicable. However, these provisions do not indicate that these conflict rules

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<sup>124</sup> See ICC rules of Arbitration in force as from 1 January 2012 <available at <http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/>>

<sup>125</sup> China International Economic and Trade Arbitration Commission CIETAC Arbitration Rules <available at <http://www.cietac.org/index.cms>>

<sup>126</sup> International Court of Arbitration at Russian Chamber of Commerce

<sup>127</sup> Translation from Russian original text available at < <http://mkas.tpprf.ru/ru/reglamentmkas.php>>

<sup>128</sup> Jeffrey Waincymer The CISG and International Commercial Arbitration (n 105) 595

should be of particular state. Consequently, tribunals are free to utilize any test like “characteristic performance” or “closest connection” in order to define applicable conflict rules. It can also be concluded that this broad authority can be exercised in a way to decide that conflict of laws that are common to the parties should be applied. In author’s opinion common conflict of law rules might as well cover the Article 1 of the CISG. It has been argued that determination of the applicable law should never take the parties by surprise and that arbitrator must ensure that choice of law will not endanger the enforceability of awards.<sup>129</sup> Therefore, conflict of law rules in Article 1 of the CISG can be construed as the common choice of law provisions for the parties coming from the Contracting states of the Convention. The question is whether arbitral tribunals in this case have to apply Art. 1 CISG directly-the way state courts have to do that.

Sub paragraphs (a) and (b) of the Article 1 of the CISG have different functions. 1(1)(a)- is an unilateral provision on the applicability of the Convention, without recourse to the conflict rules. On the other hand 1(1)(b) has a twofold purpose. It to some extent is expanding the application of the convention; however the basic purpose is to replace internal domestic rules by the convention.<sup>130</sup> Due to these differences in functions both subsections would be discussed separately.

### **2.1. Application of the CISG through Article 1(1)(a)**

It has been argued that the tribunals having seat in the non-contracting states are not bound by the provision of the Article 1(1)(a) of the CISG the way courts of the Non-contracting states are not bound it.<sup>131</sup> Generally article 1(1)(a) of the CISG leads to the direct application of the Convention when the parties to the dispute have their respective places of

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<sup>129</sup> Georgios C. Petrochilos Arbitration Conflict of law Rules (n 49); Gary B Born International Commercial Arbitration (Second edition Kluwer Law International 2014) 2620

<sup>130</sup> Georgios C. Petrochilos Arbitration Conflict of law Rules (n 49)191-218

<sup>131</sup> Urs Peter Gruber CISG in Arbitration” (n 104) 23

business in different Contracting states.<sup>132</sup> In the sense of the international arbitration this position is true if the *lex fori* is the law of the Contracting state. However, in the contrary situation when the *lex fori* is not of the Contracting state article 1(1)(a) will not be addressed as tribunal is not bound by it.

Nonetheless, there are number of the arbitral awards in which tribunals based their decisions to apply the CISG to the dispute on the Article 1(1)(a) of the Convention. *CIETAC* in its award of *10 December 2003*<sup>133</sup> reasoned that the Convention was applicable based on the following facts. First, parties did not stipulate the applicable law in the contract, therefore tribunal has to determine it in accordance with the *CIETAC* Arbitration Rules. Second, the buyer had place of business is in the U.S., and the Seller in China. Because both China and the U.S. are Contracting States of the CISG, and the two parties did not exclude the application of the CISG in the contract the Arbitration Tribunal held that the CISG would be the applicable law.

Similar decision has been rendered in the early *CIETAC* case of *1 April 1993*<sup>134</sup>. In this case parties did not agree on the applicable law to the contract, therefore tribunal had to determine it. This case is interesting as tribunal not only determined the CISG as applicable law to the contract it also defined the law that would cover the issues beyond the scope of the Convention. Tribunal decided to apply the CISG on the bases of the Article 1(1)(a) of the Convention since parties had their places of business in two different Contracting states of the Convention. As for the Law of the People's Republic of China on Economic Contracts

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<sup>132</sup> Urs Peter Gruber CISG In Arbitration (n 104) 23

<sup>133</sup> China 10 December 2003 *CIETAC* Arbitration proceeding <available at <http://cisgw3.law.pace.edu/cases/031210c1.html>>

<sup>134</sup> China 1 April 1993 *CIETAC* Arbitration proceeding <available at <http://cisgw3.law.pace.edu/cases/930401c1.html>>

Involving Foreign Interests which it determined this statute as law substituting the Convention based on the closest relation with the contractual performance test.

Another interesting case highlighting the flexibility which arbitral tribunals can employ while choosing the applicable law to the dispute is shown in the *ICC No 9448 of July 1999*.<sup>135</sup> Although this case does not concern the issue of determining the applicable law to the contract in a sense that parties failed to choose such. On the contrary parties to the contract set that law of Switzerland applied to ‘all matters respecting the making, interpretation and performance of this contract.’ The Arbitral Tribunal determined that the contract between the buyer and the seller was a contract for sale of goods under article 3(1) CISG, and that the CISG applied pursuant to article 1(1)(a) CISG, as Switzerland is a Contracting State. Interesting fact about the analysis of the tribunal is that it rendered that the requirements of the Article 1(1)(a) were met by the mere fact that state whose law was chosen as applicable is the Contracting state. This opinion is quite extraordinary in a sense that generally criteria of the applicability of the Convention through the Article 1(1)(a) is respective places of the business of the parties to the contract in the different Contracting states<sup>136</sup> not the one utilized by the tribunal in this case.<sup>137</sup>

In *ICC No 8128 of 1995*<sup>138</sup> tribunal had to determine the applicable law to the contract as parties failed to designate such. Here the tribunal tried to find a neutral law. The fact of the case are significant as several jurisdictions were involved, namely Austria (seller’s country), Switzerland (buyer’s country and place of arbitration), Germany (arbitrator’s country), Ukraine (country of the seller’s supplier also involved in the dispute). Tribunal considered

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<sup>135</sup> ICC Arbitration Case No. 9448 of July 1999 (Roller bearings case) <available at <http://cisgw3.law.pace.edu/cases/999448i1.html>>

<sup>136</sup> see CISG Article 1; Schlechtriem/Schwenzer Commentary on CISG (n 14) 39

<sup>137</sup> ICC No. 9448 (n 135)

<sup>138</sup> ICC Arbitration Case No. 8128 of 1995 (Chemical fertilizer case) <<http://cisgw3.law.pace.edu/cases/958128i1.html>>

that laws applicable in all of the above listed states could equally be applicable to the dispute as neutral law. However, tribunal went beyond this assumption and determined that Switzerland, Austria, Germany, and the Ukraine are all signatories of the Convention and in each of these countries the Convention had entered into force before the date the parties signed this contract. Tribunal further analyzed the preamble of the contract stating that ‘seller sells and the buyer buys the following product’. Considering all these criteria, tribunal decided that the most appropriate law applicable to the dispute was the CISG. Further it examined whether the requirements of the direct application of the Convention were met in the light of the Article 1(1)(a). As parties to the contract had their places of business in the different Contracting states the tribunal declared the CISG applicable to the dispute.

In the *MKAC* case of 15 November 2006<sup>139</sup> the arbitral tribunal had to determine the applicable law to the case. The tribunal analyzed the relevant provision of the contract concluded between the parties and concluded that it foresaw application of the buyer’s law which in this case was Russian law. After establishing this fact tribunal moved to evaluation of the fact that both Russia and Austria (seller’s country) have ratified the CISG therefore it constituted part of their national law. Having this in mind tribunal moved to the detailed analysis of the hierarchy of the statutes under the Russian law and established that CISG as an international treaty had the primacy over the domestic statutes. Further, it evaluated the applicability of the Convention to the dispute in the light of the Article 1(1)(a) of the CISG. Due to the fact that parties had their places of the business in different states the requirements of this provision of the Convention were met and tribunal declared it as the applicable law. The tribunal also determined that Russian law would be supplementing the CISG for the issues beyond the scope of the Convention.

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<sup>139</sup> Russia 15 November 2006 Arbitration proceeding 98/2005 (Feedstock equipment case) <available at <http://cisgw3.law.pace.edu/cases/061115r1.html>>

To conclude, arbitral tribunals tend to apply the Convention through Article 1(1)(a) of the CISG when the respective requirements of this provision are met. However, as it has been demonstrated above in some instances tribunals do not always follow the doctrinal definition, supported by the case law, of the criteria under this provision. Due to the fact that tribunals are not bound by the Convention this deviation from the established practice of application of the Convention under Article 1(1)(a) of the CISG should be excused.

## **2.2. Application of the CISG through 1(1)(b)**

It has been argued that when it comes to tribunals, 1(1)(b) is not a rule of private international law.<sup>140</sup> It is just a clarification that in factual circumstances required by this provision the CISG is to be considered the internal law of that contracting state.<sup>141</sup> Arbitral tribunals generally do not have to apply the Article 1(1)(b) of the CISG unless their conflict rules refer tribunals to the law of the Contracting state.<sup>142</sup> From arbitrators position, application of the Convention through the Article 1(1)(b) of the Convention has an advantage that eliminates the ‘conceptual problem of justifying the application of an international treaty by a forum that is not bound by it.’<sup>143</sup> This provision is widely utilized by the arbitral tribunals.

Another issue that needs to be analyzed in conjunction with the applicability of the Convention through the Article 1(1)(b) of the Convention is whether tribunals are bound by the Reservations declared by the states under the Article 95 of the CISG. In this it has been stated that Reservation under the Article 95 constitutes a policy of the reservatory state.<sup>144</sup> Since arbitration is established purely on contractual basis it does not actually belong to any state’s jurisdiction in a way to have an obligation to comply with its policy considerations. On the other hand mandatory rules of the state where the arbitral tribunal has its seat might be

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<sup>140</sup> Urs Peter Gruber CISG in Arbitration (n 104) 24

<sup>141</sup> Ibid 23

<sup>142</sup> Schlechtriem/Schwenzer Commentary on CISG (n 14) 40

<sup>143</sup> Georgios C. Petrochilos Arbitration Conflict of law Rules (n 49)

<sup>144</sup> Ibid

binding.<sup>145</sup> If the Article 95 Reservation as part of public policy is to be considered as part of the mandatory rules, then tribunals most probably would be required to comply with this reservation and do not utilize the Article 1(1)(b) for determining the applicability of the Convention. Furthermore, when an arbitrator finds the law of a certain state to be applicable he must comply with it in its entirety, the way *that state has enacted it*.<sup>146</sup> Therefore, arbitrator might be restricted from application of the Convention through the Article 1(1)(b) as a part of 95 reservation state law.

In *ICC No 11333 of 2002*<sup>147</sup> the Arbitral Tribunal held that CISG was applicable to the dispute through the Article 1(1)(b) of the Convention. Tribunal in this case analyzes whether parties' choice of the French law as applicable law constituted the tacit exclusion of the Convention's applicability. Tribunal reasoned that unless parties intended to exclude the CISG choice of the French law did not constitute an effective opt out from the Convention. Further it considered applicability of the CISG pursuant to the Article 1(1)(a) of the CISG, however it had to since it had not yet entered into force in Canada at the time the contract was concluded (Art. 100(2) CISG). Instead, CISG could be applied pursuant to Art. 1(1)(b) CISG if the rules of private international law led to the application of the law of a Contracting State. However, given that arbitrators are not bound by the conflict of laws rules but by the parties' choice of law made in conformity with the principle of party autonomy prevails and such a principle has to be considered as part of the rules of private international law referred to in Art. 1(1)(b) CISG it followed that, unless the parties, by choosing French law, intended to exclude the application of CISG, the Convention was to be applied as it had been incorporated into French law.

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<sup>145</sup> Gary B Born International Commercial Arbitration (n 129) 2630

<sup>146</sup> Georgios C. Petrochilos Arbitration Conflict of law Rules (n 49)

<sup>147</sup> ICC Arbitration Case No. 11333 of 2002 (Machine case) <available at <http://cisgw3.law.pace.edu/cases/021333i1.html>>

In its decision of *18 July 2005 MKAC*<sup>148</sup> determined that the CISG was applicable to the dispute between the Indian seller and the Russian buyer through the Article 1(1)(b) of the Convention because Russian law was chosen as applicable substantive law. Since Russia is a Contracting State to the Vienna Convention of 1980 provisions of the Convention are applicable to the present dispute on the basis of art. 1(1)(b) of the Convention.

In its award of *15 September 2008*<sup>149</sup> Foreign Trade Court attached to the Serbian Chamber of Commerce tribunal had to determine the applicable law according to the conflict of law rules it deemed the most appropriate for the case. In its decision tribunal reasoned that ‘It is widely accepted that, in case the applicable law for a sales contract is not stipulated, the law of the country where the seller has its business seat should be applied.’ Tribunal further applied the “characteristic performance test”<sup>150</sup> and determined that seller’s law, namely, Serbian law applied. Since Serbia is the successor of the former Yugoslavia<sup>151</sup> it is considered to be the Contracting party of the CISG. The other party of the contract was from Macedonia. Macedonia at the moment of the conclusion of the contract had not given the notice of succession into rights and obligations of the former Yugoslavia therefore was not considered as the Contracting state of the Convention. That is why tribunal declined to examine whether the requirements of the Article 1(1)(a) were met and directly addressed the set of conditions under Article 1(1)(b). Consequently, the law of Serbia was determined to be applicable as the law of the country in which CISG was in force. In order to supplement the CISG tribunal determined that Serbian Law of Contracts and Torts would apply.

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<sup>148</sup> Russia 18 July 2005 Arbitration proceeding 134/2004 <available at <http://cisgw3.law.pace.edu/cases/050718r1.html>>

<sup>149</sup> Serbia 15 September 2008 Foreign Trade Court attached to the Serbian Chamber of Commerce (Feta cheese and other cheese products case) <available at <http://cisgw3.law.pace.edu/cases/080915sb.html>>

<sup>150</sup> Conflict of law test stating that in sales contract in absence of the parties’ choice of law, the applicable law would be of the party performing the characteristic obligation under the contract. In sales contracts it is seller who does the characteristic performance. This test is adopted by the Rome I regulation as well.

<sup>151</sup> After dissolution of the Yugoslavia some of the Yugoslav republics such as Serbia gave notice of succession into rights and obligations of the Yugoslavia. Therefore, Serbia after giving this notice was considered to be as CISG Contracting State.

In the *ICC No 7645 of March 1995*<sup>152</sup> the issue before the tribunal was whether choice of the Austrian Law by Korean<sup>153</sup> and Czechoslovakian parties led to applicability of the CISG to the dispute. Validity of this choice, however, was never objected. Tribunal first of all examined whether there were any declarations made by Austria under the Convention which would prohibit the tribunal from applying the Convention. According to the Article 1(1)(b) the Convention applies to contracts of sale of goods between parties whose places of business are in different States when the rules of private international law lead to the application of the law of a Contracting State. Further, it reasoned that Austria by not making Declarations under the Article 95 of the CISG accepted that recourse to the Convention might be made through Article 1(1)(b) of the Convention.

To conclude, it has been demonstrated by the arbitral practice that the Article 1(1)(b) of the CISG has practical application by the arbitral tribunals. Especially in the cases where law of the Contracting state is chosen but one party has its place of business in the Non-Contracting state.

### **2.3. Application of the CISG on other basis**

Arbitral practice shows that CISG is not always applied through operation of the tribunal's conflict rules or the ones contained in the Article 1 of the CISG. In arbitration parties generally have a wider scope of choosing the applicable substantive rules to the contract.<sup>154</sup> For example, under Article 3(3) of the Rome I regulation on the law applicable to contractual obligations party autonomy is restricted to the choice of the "law of the state"<sup>155</sup>,

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<sup>152</sup> ICC Arbitration Case No. 7645 of March 1995 (Crude metal case) <available at <http://cisgw3.law.pace.edu/cases/957645i1.html>>

<sup>153</sup> Korea at the moment of the conclusion of the contract was not the Contracting state of the CISG.

<sup>154</sup> See ICC Arbitration rules Article 21(1) which states that parties are free to choose "applicable rules of law" to the merits of the case. "rules of law" is a broad concept and encompasses such documents as UNIDROIT Principles and PECL.

<sup>155</sup> REGULATION (EC) No 593/2008 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 17 June 2008

therefore, technically parties' direct choice of the CISG would not be valid under this regulation. While arbitral tribunals are more flexible and have freedom to apply CISG to the dispute through many sources as *lex mercatoria*, as trade usages without even referring to private international rules.

The arbitration tribunal in *ICC No. 5713 of 1989*<sup>156</sup> applied the CISG to a case outside the Convention's stated sphere of application. The contract at issue in this case was concluded in 1979, before the CISG took final shape in Vienna and almost a decade before the Convention became binding law anywhere. It therefore goes without saying that the CISG could not possibly govern this contract.<sup>157</sup> Tribunal however, referred to the CISG as the best source to 'determine prevailing trade usages'<sup>158</sup>

In the case *ICC No. 9117 of March 1998*<sup>159</sup> tribunal decided to apply the CISG to the contract as trade usages without any recourse to conflict of law rules. It also defined that Russian law would be applied to the issues outside of the CISG's scope. Tribunal corroborated the provision of the CISG by referring to the UNIDROIT Principles which essentially is a correct way of promoting international interpretation of the Convention as required under the Article 7(2) of the CISG.<sup>160</sup>

In its award of *31 May 2006 CIETAC*<sup>161</sup> tribunal based its decision to apply the CISG to the dispute on the provisions of the domestic law. The Contract between the Chinese buyer

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on the law applicable to contractual obligations (Rome I) <available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:177:0006:0016:En:PDF>>

<sup>156</sup> ICC Arbitration Case No. 5713 of 1989 <available at <http://cisgw3.law.pace.edu/cases/895713i1.html>>

<sup>157</sup> Richard Hyland Commentary on ICC Arbitration Case No. 5713 OF 1989 February 1994 <available at <http://cisgw3.law.pace.edu/cases/895713i1.html>>

<sup>158</sup> ICC Arbitration Case No. 5713 of 1989 <available at <http://cisgw3.law.pace.edu/cases/895713i1.html>>

<sup>159</sup> ICC Arbitration Case No. 9117 of March 1998 <available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=399&step=Abstract>>

<sup>160</sup> See Article 7(2) of the CISG stating that issues not expressly settled in the CISG should be interpreted in accordance with the general principles of law.

<sup>161</sup> China 31 May 2006 CIETAC Arbitration proceeding (Diesel generator case) <available at <http://cisgw3.law.pace.edu/cases/060531c1.html>>

and the Singaporean seller did not specify the applicable law. Since both countries are the Contracting states tribunal reasoned that based on Article 142 of the Civil Code of the PRC, the CISG shall apply. As to the issues beyond the scope of the CISG, the Arbitration Tribunal in accordance with the “closest connection test” deems that China has the closest relationship with the dispute in this case. Therefore, Chinese law was rendered to substitute the CISG vis a vie issues beyond the Convention’s scope.

Arbitral practice demonstrated above shows that tribunals are free to apply the CISG when they deem such applicable. The grounds for application are not always conventional and in line with the leading trends employed by the courts showing once again that in arbitration parties are free to determine the way they wish the Convention to be applied to their dispute. On the other hand, tribunals as well employ relative freedom in determining the grounds for applicability of the Convention other than conflict rules.

## Conclusion

The analysis of the way the different dispute resolution bodies apply the Convention to the cases before them leads to several issues which can be solved by comparing trends employed by the courts and the tribunals.

First of all it should be noted that courts are bound by the stricter standards towards application of the Convention. Courts in the Contracting states have the direct obligation under the Vienna Convention on Law of Treaties to apply the Convention when the requirements of its applicability are met. On the other hand tribunals which do not belong to any jurisdiction have no public international obligation to use CISG as the law applicable to the merits even if requirements of the applicability are met. In this regard arbitral tribunals and the courts in the Non-contracting states have the same status since both have no direct obligation to apply the Convention. This leads to assumption that standards utilized by the tribunals can also be used by the courts of the Non-contracting states. However, it is very questionable that state bodies as courts would employ standards set by the private dispute resolution bodies.

Nonetheless, when parties to the dispute have exercised their right to determine the law applicable to the merits of the case, as shown in the previous chapters, both courts and the tribunals are bound to comply with such party autonomy. However, the case law discussed above shows that in the same case scenarios courts and tribunals might have different solutions. In *Cour d'Appel de Colmar*<sup>162</sup> court reasoned that choice of French law expressly excluded applicability of the CISG. Contrary to this position, tribunal I *ICC No 6653 of 1993*<sup>163</sup> reasoned that choice of the same French law did not exclude the applicability of the

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<sup>162</sup> France 26 September 1995 Appellate Court Colmar (n 27)

<sup>163</sup> ICC No. 6653 (n 113)

CISG and if parties wanted such opt out they should have been explicit in the wording of the clause.

Further, when parties fail to exercise their right to designate the applicable law the courts and the tribunals have to determine it. The procedure in this regard is different in a way that courts have two-level system under which first they have to first, resort to their own national conflict rules and second, examine the applicability of the CISG in the light of Article 1 of the CISG if domestic conflict rules indicate law of the Contracting state. Tribunals on the contrary do not have such mandatory two tier system. Most of the institutional rules as demonstrated above allow arbitrators to determine appropriate conflict rules themselves or directly apply appropriate law. In this regard, tribunals can simply refer to the conflict rules of the CISG as appropriate choice of law provisions and thus determine whether convention applies.

Another issue which is of great importance is equally attributable to the courts and the tribunals. It has been argued in the scholarly writings and shown in case law as well that an international *stare decisis* has to be employed in terms of uniform application of the CISG.<sup>164</sup> In its decision *Tribunale di Vigevano*<sup>165</sup> judge acknowledges the importance of uniformity in interpretation of the Convention, therefore, cites more than twenty cases from different Contracting states and basis its render on their analysis. The same approach has been upheld by the *US Federal District Court of New York*<sup>166</sup> when it referred to the practice of the German courts with regards to applicability of the CISG in the certain scenarios. In order to achieve the true uniformity in application of the Convention all dispute resolution bodies should at least apply the convention in the same manner. As it has been demonstrated above solutions provided by the courts and tribunals might differ in the relatively same scenario.

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<sup>164</sup> Franco Ferrari CISG Case Law (n 17) 258

<sup>165</sup> Italy 12 July 2000 District Court Vigevano (n 15)

<sup>166</sup> United States 26 March 2002 Federal District Court (n 74)

The uniformity in application of the Convention will promote the legal certainty for the parties which is the key aspect of the international dispute resolution.

To conclude, the growing number of the Contracting states once more highlights the success of the Convention as uniform framework for international sale of goods. However, this success cannot be maintained if the state courts and tribunals do not promote the application of the CISG where necessary. That is why it should be recommended that all dispute resolution bodies employ the same standards and set the same threshold for establishing the applicability of the Convention.

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